

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHAEL CLARK,
#67471

Plaintiff,

vs.

NDOC MEDICAL,

Defendant.

2:10-cv-00882-RLH-RJJ

ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. On August 25, 2010, the court dismissed plaintiff's complaint with leave to file an amended complaint (docket #9). When more than the allotted time had passed and plaintiff failed to file an amended complaint, the court dismissed this action with prejudice (docket #15). On December 6, 2010, plaintiff filed a motion for district judge to reconsider order (docket #17). In his motion, plaintiff stated that he had in fact filed an amended complaint and that he thought the amended complaint may have been filed in another of the several actions plaintiff has pending before this court. The court has discovered that, due to plaintiff's error, his amended complaint was filed in another case. The court has directed the Clerk to correct the error and file the amended complaint in this case (docket #24).

1 Accordingly, plaintiff's motion for district judge to reconsider order (docket #17) is
2 granted. This court's order dismissing this action with prejudice (docket #15) is vacated, and the
3 judgment is vacated (docket #16).

4 The court now reviews plaintiff's amended complaint (docket #24).

5 **I. Screening Standard**

6 Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a
7 prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious,"
8 "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who
9 is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an
10 arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may,
11 therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or
12 where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a
13 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*
14 *v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
16 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
17 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under
18 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,
19 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a "formulaic recitation of the
20 elements of a cause of action;" it must contain factual allegations sufficient to "raise a right to relief
21 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
22 (2007). "The pleading must contain something more...than...a statement of facts that merely creates a
23 suspicion [of] a legally cognizable right of action." *Id.* In reviewing a complaint under this standard,
24 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*
25 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to
26 plaintiff and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). Moreover, "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right." *Hydrick v. Hunter*, 466 F.3d 676, 689 (9th Cir. 2006).

II. Instant Complaint

In his first amended complaint, plaintiff, who is incarcerated at Northern Nevada Correctional Center ("NNCC"), now sues the Nevada Department of Corrections ("NDOC"), NDOC Medical Director Dr. Bannister, Dr. Sanchez, Dr. Moffett, the following nurses, whom he identifies by first name only: John, Betty, and Ben, and Doe nurses 1 and 2. While it is unclear what plaintiff claims transpired at which institution, he alleges that since about May 2008, medical staff at Southern Desert Correctional Center ("SDCC") and High Desert State Prison ("HDSP") have been deliberately

1 indifferent to his serious medical needs in violation of his Eighth Amendment rights.

2 In count I, plaintiff claims that he sustained several injuries on June 30, 2008, including
3 eye injuries, back injuries, knee injury, nerve damage and chest pain. He does not further describe these
4 injuries except with the conclusory statement that they are all “long lasting and serious.” He claims
5 generally that nursing staff at SDCC and HDSP as well as Dr. Sanchez ignored plaintiff when he
6 requested treatment.

7 In count II, plaintiff claims that Dr. Moffett failed to provide treatment for an eye injury.
8 Plaintiff alleges only that his eye became infected and now only surgery will correct his vision. He also
9 notes that he went to the infirmary several times with chest pains, “nothing was done,” and he was
10 charged for each visit.

11 In count III, plaintiff claims generally that his diabetes has not been properly monitored
12 or treated by “the defendants,” resulting in increasing pain and permanent physical damage.

13 In its order dismissing plaintiff’s original complaint with leave to amend, the court
14 advised plaintiff that a detainee or prisoner’s claim of inadequate medical care does not constitute cruel
15 and unusual punishment in violation of the Eighth Amendment unless the mistreatment rises to the level
16 of “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The
17 “deliberate indifference” standard involves an objective and a subjective prong. First, the alleged
18 deprivation must be, in objective terms, “sufficiently serious.” *Farmer v. Brennan*, 511 U.S. 825, 834
19 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, the prison official must act with a
20 “sufficiently culpable state of mind,” which entails more than mere negligence, but less than conduct
21 undertaken for the very purpose of causing harm. *Farmer*, 511 U.S. at 837. A prison official does not
22 act in a deliberately indifferent manner unless the official “knows of and disregards an excessive risk
23 to inmate health or safety.” *Id.*

24 In his amended complaint, plaintiff fails to describe his injuries and illnesses beyond the
25 conclusory statement that they are “serious.” He provides no specific facts regarding the injuries alleged
26 in count I. In count II, while he claims that he needs surgery to correct his vision, he does not allege that

1 he is blind, or provide any facts regarding the severity of the alleged damage to his eyesight. While in
2 count III he states he has suffered permanent physical damage due to lack of treatment of his diabetes,
3 he provides no further facts. He has not set forth factual allegations to demonstrate that medical
4 personnel (and again, it's not clear which institution he's referring to throughout the complaint) knew
5 of and disregarded excessive risks to his health. As plaintiff has already been given an opportunity to
6 amend, further amendment is futile. Accordingly, plaintiff's complaint is dismissed with prejudice for
7 failure to state a claim for which relief may be granted.

8 Finally, plaintiff had filed a notice of appeal of this court's November 15, 2010 order
9 dismissing the action upon his apparent failure to file an amended complaint (*see* docket #18). As the
10 court granted plaintiff's motion to for the district judge to reconsider its order, it appears to this court
11 that plaintiff's appeal is moot. Accordingly, plaintiff's motion for leave to proceed *in forma pauperis*
12 on appeal (docket #21) is denied as moot.

13 **III. Conclusion**

14 **IT IS THEREFORE ORDERED** that plaintiff's motion for district judge to reconsider
15 order (docket #17) is **GRANTED**.

16 **IT IS FURTHER ORDERED** that this court's order dismissing this action with
17 prejudice (docket #15) is **VACATED**.

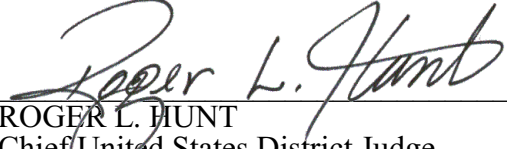
18 **IT IS FURTHER ORDERED** that the judgment entered on November 15, 2010 (docket
19 #16) is **VACATED**.

20 **IT IS FURTHER ORDERED** that plaintiff's amended complaint (docket #24) is
21 **DISMISSED** with prejudice and without leave to amend for failure to state a claim for which relief may
22 be granted.

23 **IT IS FURTHER ORDERED** that plaintiff's motion for leave to proceed *in forma*
24 *pauperis* on appeal (docket #21) is **DENIED** as moot.

1 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly and close
2 this case.

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4 DATED 7th day of January, 2011.

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7 ROGER L. HUNT
8 Chief United States District Judge
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